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No. 03-569

In The

Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE, and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether state statutes that balance the interests of in-state utilities and their holding companies against the interests of the utilities' in-state ratepayers, and that have the sort of extraterritorial impact that is an inevitable by-product of modern utility regulation, are subject to *per se* condemnation under the Commerce Clause.

2. Whether, under the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970), the burden imposed on interstate commerce by such statutes is clearly excessive in relation to the compelling state interest in the effective regulation of the activities and structure of franchised utilities that the statutes advance.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT 2

A. The Wisconsin Utility Holding Company Act 2

B. The Challenged Statutory Provisions 3

C. The Court of Appeals' Decision 4

REASONS WHY THE PETITION SHOULD BE DENIED 6

1. The decision below is consistent with other decisions of the courts of appeals upholding structural regulation of utilities and their holding companies against Commerce Clause challenges. 6

2. The decision below presents no conflict with the decisions of this Court. 9

   a. No decision of this court renders unconstitutional evenhanded utility regulation that inevitably has extraterritorial effects. 9

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b. This Court's decisions do not require state regulation of utilities and their holding companies to be restricted to those incorporated under the regulating state's laws..... 11

c. *Pike* does not render unconstitutional states' structural regulation of utilities on the ground that the same regulatory goals might be achieved through conduct prohibitions. 13

3. Alliant is estopped from challenging the structural provisions..... 15

CONCLUSION. 17

CASES CITED

Baltimore Gas and Electric Co. v. Heintz,
760 F.2d 1408 (4th Cir.)
cert. denied, 474 U.S. 847 (1985)..... 7, 8, 14, 15

BellSouth v. F.C.C.,
144 F.3d 58 (D.C.Cir. 1998)..... 14

Brown-Forman Distillers Corp. v.
New York State Liquor Auth.,
476 U.S. 573 (1986)..... 10

Computer and Communications
Industry Ass'n v. FCC,
693 F.2d 198 (D.C.Cir. 1982)..... 14

LABLE COPY

Continental T.V., Inc. v. GTE Sylvania Inc.,
433 U.S. 36 (1977)..... 10

CTS Corp. v. Dynamics Corp.,
481 U.S. 69 (1987)..... 10, 12

Edgar v. MITE Corp.,
457 U.S. 624 (1982)..... 9

Exxon Corp. v. Governor of Maryland,
437 U.S. 117 (1978)..... 14

Fahey v. Mallonee,
332 U.S. 245 (1947)..... 4, 5, 15, 16

Healy v. Beer Institute,
491 U.S. 324 (1989)..... 10

Maryland v. United States,
460 U.S. 1001 (1983) 14

Pike v. Bruce Church,
397 U.S. 137 (1970)..... i, 6, 7, 8, 1, 15

SBC Communications, Inc. v. F.C.C.,
154 F.3d 226 (5th Cir. 1998) 14

Southern Union Co. v. Missouri Pub. Serv. Com'n,
289 F.3d 503 (8th Cir. 2002) 8, 9

United States v. Amer. Tel. and Tel. Co.,
552 F.Supp. 131 (D.D.C. 1982)..... 14

STATUTES CITED

Wis. Stat. ch. 180..... 4

Wis. Stat. § 196.52(3) 11

Wis. Stat. § 196.795 2

Wis. Stat. § 196.795(2) 5

Wis. Stat. § 196.795(3) 3, 5

Wis. Stat. § 196.795(5)(a) 4, 5

Wis. Stat. § 196.795(5)(L) 4, 5, 11, 13

Wis. Stat. § 196.795(6m) 4, 5

Wis. Stat. § 200.01(2) 4, 5

OTHER AUTHORITIES

Wisconsin Utility Holding Company Act (WUHCA)
1985 Wisconsin Act 79 ..... 2, 3, 9, 11, 12, 13, 15, 16

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Burneatta Bridge, Ave M. Bie and Robert M. Garvin, Commissioners of the Wisconsin Public Service Commission, respectfully request that this Court deny the petition for writ of certiorari of Alliant Energy Corporation (Alliant), seeking review of the Seventh Circuit's decision in this case and the reasoning set forth in its rehearing decision. The Seventh Circuit opinion is reported at 330 F.3d 904 and the rehearing opinion is reported at 336 F.3d 545.

STATEMENT

A. The Wisconsin Utility Holding Company Act

Among other claims in this action, Alliant brought a Commerce Clause challenge to four provisions that form part of the Wisconsin Utility Holding Company Act (WUHCA), 1985 Act 79, found at Wis. Stat. § 196.795. WUHCA was the legislative response to the political struggle over authorization for utility diversification in Wisconsin that spanned the first half of the 1980's. During this time, Wisconsin utilities were completing a construction cycle of new facilities, expected to have cash available in excess of the utilities' expected needs, wished to be able to invest that cash in other opportunities, and sought legislative authorization to form holding companies to engage in non-utility endeavors (NR. 070, ¶ 12).

Several organizations representing the interests of utility ratepayers were opposed to legislation authorizing the formation of utility holding companies. These parties thought that holding companies posed a threat to the interests of ratepayers, because they might divert the attention of management, create unnecessary risks of the utilities ratepayers cross-subsidizing the non-regulated activities of the holding companies, and raise the cost of capital for the utilities (NR. 070, ¶ 13).

Representatives of the Wisconsin Public Service Commission (PSC) attempted to reach an acceptable compromise among the interested parties on legislation that would authorize the formation of holding companies, and contain regulatory controls sufficient to reduce the risks to ratepayers from holding companies without unreasonably restricting the utilities' or holding companies' management decisions (NR. 070, ¶ 14).

Ultimately, an acceptable compromise was achieved following negotiations among the PSC, the legislature, the governor's office, the utilities, and the ratepayer organizations. The compromise was embodied in legislation addressing energy utility reorganization and diversification that was approved by the legislature in special session, signed by the governor in November 1985, and became the Wisconsin Utility Holding Company Act (WUHCA), 1985 Wisconsin Act 79 (NR. 070, ¶ 15).

Wisconsin Power and Light Company (WPL) is the Wisconsin utility that Alliant owns. In 1985, WPL supported WUHCA, recognizing that, from its perspective, it was likely the best legislation that could be passed at that time. (NR. 083 at 9-11). In 1987, WPL relied upon the legislative changes brought about by WUHCA to form WPL Holdings, which eventually evolved into Alliant (NR. 071, ¶ 3; NR. 072, ¶ 18). Alliant is a utility holding company within the meaning of the statute. In this lawsuit, Alliant challenges integral provisions of the legislation that authorized its existence.

B. The Challenged Statutory Provisions

The four provisions of WUHCA that Alliant challenged in this action are:

> Wis. Stat. § 196.795(3), which requires PSC approval for any person to hold or acquire more than 10% of the outstanding voting shares of a public utility holding company. As of March 19, 2002, the market value of 10% of the outstanding shares of Alliant, disregarding any control premium, was approximately $266 million (NR. 073, Ex. 2 at 9).

Wis. Stat. § 196.795(6m), which establishes an asset cap that limits the extent to which a public utility holding company may invest in non-utility businesses. This provision was modified in 2000 in a way that benefited Alliant (NR 072, ¶ 14; NR. 083 at 15-16; NR 073, Ex. 2 at 6). As of December 31, 2001, the value of Alliant's investments in non-utility businesses was less than half the amount permitted under the asset cap (NR. 073, Ex. B to Ex. 2).

Wis. Stats. §§ 196.795(5)(a) and 200.01(2), which establish conditions under which the PSC may deem a public utility holding company to be a "public service corporation," thereby rendering the company's issuance of securities subject to PSC approval. Alliant has not alleged that it or any other utility holding company has ever been held to be a public service corporation within the meaning of these provisions.

Wis. Stat. § 196.795(5)(L), which requires a Wisconsin public utility holding company to be organized under Wis. Stat. ch. 180. Alliant is a Wisconsin corporation organized under Wis. Stat. ch. 180.

C. The Court of Appeals' Decision

In the decision below, the Seventh Circuit affirmed in part and reversed in part the district court's judgment in favor of the defendants. The court of appeals first addressed the holding of the district court that, under *Fahey v. Mallonee*, 332 U.S. 245 (1947), Alliant is estopped from challenging the constitutionality of the limitations included in the statute that authorized its creation as a utility holding company

under Wisconsin law. The court ruled that what it characterized as the structural provisions – the PSC takeover approval provision (Wis. Stat. § 196.795(3)), the asset cap provision (Wis. Stat. § 196.795(6m)), and the PSC regulation of securities provisions (Wis. Stats. §§ 196.795(5)(a) and 200.01(2)) – were "probably not severable" from the provision that authorized Alliant's formation as a holding company (Wis. Stat. § 196.795(2)) (Pet. 18a). If the provisions are not severable, then, as the district court held, Alliant is estopped under *Fahey* from challenging their constitutionality. The court concluded, however, that "we need not resolve the issue today, because, as discussed below, we conclude that even if Alliant can challenge the structural provisions the challenge must fail." (*Id.*)

The court then addressed the in-state incorporation requirement for utility holding companies set forth in Wis. Stat. § 196.795(5)(L). It ruled that this provision produces burdens on interstate commerce that could be substantial, as it requires that the ultimate ownership of Wisconsin utilities to lie in Wisconsin corporations and so discourages investment opportunities in those utilities. The court rejected the defendants' conditional justification for the provision as serving a legitimate state interest if Alliant were correct that the constitutionality of the structural provisions turned on whether they regulated only in-state corporations. The court concluded that Alliant's position was wrong, and so the stated purpose of the in-state incorporation requirement was moot. Reversing the district court, the court held that Wis. Stat. § 196.795(5)(L) violated the Commerce Clause and hence was unconstitutional.

Next, the court held that the challenged provisions that regulate the financial structure and activities of holding companies that own Wisconsin utilities did not suffer from this constitutional infirmity. Since these provisions regulate in-state and out-of-state economic interests in a facially neutral and even-handed manner but indirectly burden

interstate commerce, they are to be analyzed under the balancing test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The court recognized that the provisions have "no small impact" on interstate financial transactions, but that they further the state interest in effective regulation of local public utilities by "help[ing] to prevent such abuses as cross-subsidization and deceptive reporting of cost allocation" (Pet. 32a). According to the court, "A State is entitled to regulate the financial structure and investments of companies that control utilities in that State; otherwise it would lose considerable power to police the rates charged for the provision of utility service. The burden on interstate commerce, however significant it may be, is not enough to outweigh this interest" (Pet. 34a). The court also rejected Alliant's argument that the structural prohibitions at issue were rendered unnecessary by conduct restrictions also included in Wisconsin law.

The court subsequently issued an opinion denying Alliant's petition for rehearing *en banc*. In this second opinion, the court further explained its rejection of Alliant's assertion that every state regulation that has any extraterritorial effect whatsoever is *per se* unconstitutional.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below is consistent with other decisions of the courts of appeals upholding structural regulation of utilities and their holding companies against Commerce Clause challenges.

The decision below is the third court of appeals decision since 1985 rejecting Commerce Clause challenges to state laws regulating the financial structure of utilities and

their holding companies. The reasoning set forth in the three decisions has been consistent and persuasive, and suggests no need for guidance from this Court.

In 1985, in *Baltimore Gas and Electric Co. v. Heintz*, 760 F.2d 1408 (4th Cir.), *cert. denied*, 474 U.S. 847 (1985), the Fourth Circuit upheld a Maryland law that generally prohibited entities from acquiring more than ten percent of the capital stock of a Maryland utility unless that entity already owned a public utility. This had the effect of barring a Maryland utility from reorganizing into a holding company structure. While recognizing that the statute had a substantial effect on interstate transactions, the court ruled that its restrictions were to be judged by the *Pike* balancing test.

The court found that the challenged restriction furthered the state's legitimate interest in regulating the structure of public utilities and their holding companies. It noted that the legitimacy of the state's interest in preventing holding company abuse through structural restrictions was not affected by the presence of overlapping provisions addressing possible utility abuses in other ways. Since the state's interest in protecting utility ratepayers outweighed the burden on interstate commerce that resulted from prohibiting the formation of utility holding companies, the court concluded that the challenged law was consistent with the Commerce Clause.

Finally, the court rejected the utility's assertion that it should consider whether the state's interest could be as effectively protected in a less restrictive manner. The court explained that when "the challenged statute does not discriminate against interstate commerce but regulates evenhandedly, the court does not inquire strictly into whether alternative nondiscriminatory means of protecting the state interest are available." *Baltimore Gas and Electric Co.*, 760 F.2d at 1427.

Similarly, the Eighth Circuit in *Southern Union Co. v. Missouri Pub. Serv. Com'n*, 289 F.3d 503 (8th Cir. 2002), rejected a Commerce Clause challenge to a Missouri statute that required public utilities conducting business in the state to receive prior approval from the Missouri Public Service Commission before purchasing stocks or bonds issued by another utility. Southern Union Co., which operates a natural gas utility in Missouri, contended that the statute violated the Commerce Clause, since it authorized the Missouri PSC to prohibit it, a Delaware corporation with its principal office in Texas, from making acquisitions in Texas of the stock of other non-Missouri corporations.

Since the challenged provision did not amount to discrimination against interstate commerce or other form of economic protectionism, the court rejected Southern Union's argument that it was subject to *per se* condemnation. The court then turned to the *Pike* balancing analysis. It concluded that, so long as the Missouri PSC properly based its decision on the effect of the action under review on the ratepayers in the state, no argument was available that the provision violated the Commerce Clause on the basis of its possible extraterritorial effect. Finally, citing *Baltimore Gas*, the court explained that Missouri has a legitimate interest in protecting local ratepayers by regulating the corporate structure of utility companies, and that Southern Union failed to demonstrate a burden on interstate commerce sufficient to outweigh that interest.

The decision below continues the consistent reasoning of the courts of appeals on these issues. All three decisions applied the *Pike* balancing test to reject Commerce Clause challenges to state regulations affecting the financial structure of in-state utilities and their holding companies. Like the Fourth Circuit in *Baltimore Gas*, the Seventh Circuit found that a state's strong interest in regulating the financial structure of its franchised utilities and their holding companies was not undercut by overlapping restrictions

included in a comprehensive utility regulatory scheme, nor by the suggestion that the state's interest could be vindicated by less restrictive means. Like the Eighth Circuit in *Southern Union*, the court also relied on a state's compelling interest in protecting its utility ratepayers to reject the facile notion that any state utility regulation that impedes transactions taking place beyond the state's borders or that has other extraterritorial effect is thereby rendered *per se* unconstitutional. Since there presently exists a uniformity of decisions on these issues among the federal courts of appeals, this is not a case that merits review by this Court.

2. The decision below presents no conflict with the decisions of this Court.

a. No decision of this court renders unconstitutional even-handed utility regulation that inevitably has extraterritorial effects.

Alliant based its challenge to the WUHCA provisions at issue on the premise that, as the Seventh Circuit put it, this Court's precedent "mandates the *per se* invalidation of *every* state regulation that has any extraterritorial effect whatsoever" (Pet. 2a). The Seventh Circuit's rejection of this assertion gives rise to what Alliant perceives to be the conflict between the decision below and this Court's decisions.

However, as the Seventh Circuit explained, Alliant misconstrues this Court's holdings (Pet. 2a-9a). Part V-A of Justice White's opinion in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), upon which Alliant relies, did not represent the views of a majority of the Court. The Court also did not adopt this aspect of Justice White's reasoning in

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986), but cited his opinion only for the established proposition that direct regulation of interstate commerce is virtually *per se* unconstitutional. Since *Healy v. Beer Institute*, 491 U.S. 324 (1989), dealt with direct extraterritorial price regulation and facial discrimination against out-of-state products, its condemnation of the price-affirmation law at issue did not signal a change in the Court's analytical approach. Finally, in *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987), the Court upheld the challenged statute in large part because it served to protect a vital interest of local residents in every application. More to the point, while the statute had the effect of burdening some out-of-state transactions, the Court rejected the notion that this mandated application of a rule of *per se* unconstitutionality.

As *CTS* implies, there is no justification for relying upon the judicial shortcut of a *per se* rule of condemnation when a state statute regulates evenhandedly and consistently advances a legitimate state interest, even if it has effects on transactions outside its borders. *Per se* rules are only warranted when experience has shown that the application of the relevant principles to a discrete category of cases consistently points toward a conclusion of illegality and that exceptions are insufficiently common or important to justify the time and expense necessary to identify them. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) (discussing *per se* rules under the Sherman Act). The presence of an extraterritorial impact, standing alone, does not necessarily imply that the burden an evenhanded statute imposes on interstate commerce is excessive when weighed against the state interest that it advances, and so the justification for the application of a *per se* rule is absent.

Indeed, a state cannot effectively regulate an in-state utility that is part of a multi-state holding company without affecting transactions that take place beyond its borders. For

example, states often subject to regulatory review transactions between local utilities and companies that are affiliates in the same holding company system. *See, e.g.*, Wis. Stat. § 196.52(3). These transactions might certainly take place outside the state, but this has not previously been thought to be enough to render unconstitutional the state's exercise of regulatory authority in this regard.

The rule of *per se* condemnation for any state regulation that has extraterritorial effects that Alliant advances would vitiate meaningful state regulation of public utilities and their holding companies. The reasoning of the three courts of appeals that have addressed this issue has converged on this point. No holding of this Court is inconsistent with that conclusion. The discussion of the extraterritoriality issue in the decision below does not present a conflict with this Court's decisions that warrants review.

b. This Court's decisions do not require state regulation of utilities and their holding companies to be restricted to those incorporated under the regulating state's laws.

The Seventh Circuit found unconstitutional Wis. Stat. § 196.795(5)(L), which requires a Wisconsin public utility holding company to be a Wisconsin corporation. As a result of this ruling, Alliant, which is a Wisconsin corporation, could change its state of incorporation, or potentially could be acquired by a non-Wisconsin corporation, if the Wisconsin PSC approved.

Alliant has capitalized on this ruling by emphasizing in its petition that the WUHCA structural provisions that the Seventh Circuit upheld now apply to holding companies that own Wisconsin utilities, even if the holding companies are not Wisconsin corporations. Alliant relies in part on *MITE*

and *CTS* to argue that, in its view, this fact even more clearly demonstrates the incompatibility of the challenged provisions with the requirements of the Commerce Clause.

Again, Alliant's argument is misguided. As the Seventh Circuit explained, the critical consideration in assessing a Commerce Clause challenge is the overall effect of the statute on both local and interstate activity (Pet. 3a). If the statute governs only the activities of in-state corporations, this should reduce its impact on interstate commerce and so make it less likely that that impact outweighs the state interest the statute promotes. It should also reduce the possibility that multi-state businesses will confront inconsistent state regulation.

But the fact that a limitation of its applicability to in-state corporations may turn out in some cases to be a *sufficient* basis for finding that a statute passes muster under the Commerce Clause does not imply that such a limitation is a *necessary* requirement for finding the statute constitutional. Like Alliant's treatment of the extraterritoriality issue, the approach it advocates to in-state incorporation mistakenly truncates the appropriate Commerce Clause analysis. Rather than attaching conclusive weight to one factor, that analysis properly assesses an evenhanded statute's relative impacts on both in-state and interstate activity. While a restriction on the applicability of the statute to in-state corporations may be relevant to this analysis, it is not necessarily dispositive. In this case, as the Seventh Circuit explained, the compelling state interest that the structural WUHCA provisions advance enables them to pass Commerce Clause scrutiny, even if holding companies to which those provisions apply are incorporated outside of Wisconsin.

If the Seventh Circuit is wrong on this point, and this Court concludes that the constitutionality of the challenged provisions does in fact turn on whether their applicability is restricted to Wisconsin corporations, then the Seventh Circuit

would also turn out to be wrong in ruling Wis. Stat. § 196.795(5)(L) unconstitutional. This provision, enacted with the other provisions of WUHCA in 1985, requires Wisconsin holding companies to be Wisconsin corporations. It has the effect of limiting the applicability of the restrictions imposed by the other challenged provisions to in-state corporations. If the constitutionality of the WUHCA regulatory scheme depends upon its provisions being limited to Wisconsin corporations, then § 196.795(5)(L) is necessary for the state to achieve the important regulatory goals the WUHCA structural provisions are intended to advance. Thus, if the Court should grant Alliant's petition, it should also grant the respondents' conditional petition for a writ of certiorari and also consider the ruling striking down Wis. Stat. § 196.795(5)(L).

c. *Pike* does not render unconstitutional states' structural regulation of utilities on the ground that the same regulatory goals might be achieved through conduct prohibitions.

The final respect in which Alliant claims that the decision below conflicts with this Court's decisions is in the Seventh Circuit's rejection of Alliant's argument that the structural provisions are invalid because they are redundant of other regulations. Citing *Pike*, Alliant contends that even-handed regulation must fail a Commerce Clause challenge if a court can conclude that the regulatory concerns prompting the regulation could be vindicated in some less burdensome way. To Alliant, this rings the death knell for structural regulations affecting interstate commerce, since prohibitions on conduct can always be devised to address the danger the structural regulations are intended to prevent.

But it cannot be the case, as Alliant's argument implies, that if a state's structural regulation of utilities affects interstate commerce, it is invariably unconstitutional

under the Commerce Clause. Such an argument ignores the established regulatory tradition of imposing structural remedies and prohibitions on regulated entities where the entities otherwise would have an incentive and the ability to act in a way that is contrary to public policy. Telecommunications regulation provides the best example of this, particularly the divestiture of the Bell regional operating companies that followed the settlement of the government's antitrust suit against AT&T. *United States v. Amer. Tel. and Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). *See also BellSouth v. F.C.C.*, 144 F.3d 58, 66 (D.C.Cir. 1998), *cert. denied*, 526 U.S. 1086 (1999) ("We have long recognized that structural separation is 'a permissible regulatory tool' for ensuring 'that no cross-subsidization or unfair competitive practices occur.'" (*quoting Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 219 (D.C. Cir. 1982))); *SBC Communications, Inc. v. F.C.C.*, 154 F.3d 226 (5th Cir. 1998), *cert. denied,* 525 U.S. 1113 (1999).

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), illustrates another example of structural regulation complementing conduct regulation. The Maryland legislature determined that during times of gasoline shortage, gasoline refiners were favoring the retail service stations they owned and operated over the non-affiliated service stations with which the refiner-owned stations competed. Rather than rely exclusively on statutory or regulatory prohibitions on such preferences, the legislature imposed a structural remedy. The refiners were required to divest their interests in service stations. This Court held that the imposition of this structural remedy was consistent with the Due Process Clause and the Commerce Clause, a conclusion that is inconsistent with Alliant's position.

The Fourth Circuit in *Baltimore Gas* explained the fallacy in Alliant's argument that evenhanded structural utility regulations are unconstitutional when the state has

imposed, or could impose, other regulations intended to achieve the same ends:

> The state may regulate the rates utilities charge consumers either directly, by requiring commission approval of rate increases, or indirectly, by controlling certain investments and attempts at diversification by the utility. That is, a state may choose one or more means to a particular end, and the legitimacy of the end – the state interest served by the particular regulation – is not vitiated when the state chooses several means of achieving that end. To hold otherwise would permit a utility to choose which of several overlapping regulations with which it will comply and allow the utility to challenge as unconstitutional those that it finds unduly burdensome.

Baltimore Gas, 760 F.2d at 1425.

The approach Alliant advocates would strip the states of their power to impose evenhanded structural regulations having interstate effects, and would authorize the courts to second-guess state legislatures on the efficacy of their regulatory schemes for utilities. These results are not mandated by this Court's decision in *Pike* or any other case. Once again, since there is no genuine conflict to be addressed, the Seventh Circuit decision does not warrant this Court's review.

3. Alliant is estopped from challenging the structural provisions.

The district court held that, under *Fahey v. Mallonee*, 332 U.S. 245 (1947), Alliant was estopped from challenging the constitutionality of the restrictions included in WUHCA,

the statute that authorized its existence. According to the court, WUHCA "reflects a legislative compromise, permitting utility holding companies to form but only under the strict requirements of the Act. Alliant is precluded by the doctrine of *Fahey* from forming under the Act and subsequently challenging the restrictions which were part of the bargain of its formation" (Pet. 53a).

The Seventh Circuit indicated its agreement with the district court's reasoning, but concluded that it need not reach the issue in light of its conclusion that Alliant's Commerce Clause challenge to the structural provisions failed.

The district court was correct. WUHCA embodies a compromise worked out among the Wisconsin legislature, the PSC, and the state's utilities and ratepayer organizations. The Wisconsin legislature would not have intended the many provisions in WUHCA beneficial to utilities and holding companies to survive deletion of the structural restrictions set forth in the challenged provisions and included in WUHCA as an indispensable regulatory counterweight. As the Seventh Circuit explained, it "appears improper to sever the structural provisions from § 196.795(2)," the WUHCA provision that authorized the formation of utility holding companies like Alliant (Pet. 18a). Since the provisions are non-severable, the *Fahey* estoppel doctrine applies.

The fact that Alliant is estopped from challenging the constitutionality of the structural provisions stands as an independent ground for the Seventh Circuit's holding, and precludes Alliant from obtaining the relief it seeks. Since Alliant could not prevail in this action even if its Commerce Clause argument were correct, there is no reason for this Court to review this case in order to consider that argument.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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